

ORIGINAL

CARLSMITH BALL LLP
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P.O. Box 5241
Saipan, MP 96950-5241
Tel No. 670.322.3455

FILED
Clerk
District Court

MAY 16 2006

Attorneys for Defendant
Maeda Pacific Corporation

For The Northern Mariana Islands
By _____
(Deputy Clerk)

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

TOSHIHIRO TAKAHASHI,

Plaintiff,

vs.

MAEDA PACIFIC CORPORATION,

Defendant.

CIVIL ACTION NO. CV 05-0026


MOTION IN LIMINE TO EXCLUDE
TESTIMONY OF PLAINTIFF'S
DESIGNATED MEDICAL EXPERT;
EXHIBITS A-B; DECLARATION OF
JOHN D. OSBORN

TRIAL DATE: May 30, 2006
TIME: 9:00 A.M.
JUDGE: Alex R. Munson

Comes now the Defendant Maeda Pacific Corporation and moves the Court for an Order *In Limine* to exclude the introduction of evidence and testimony of Dr. H. Christine Brown at trial. This motion is supported by the Memorandum of Points and Authorities attached hereto, the declaration of John D. Osborn, the attached exhibits, the pleadings filed herein and such additional evidence as may be produced at argument on the motion.

CARLSMITH BALL LLP

DATED: Saipan, MP, May 16, 2006.


JOHN D. OSBORN
Attorneys for Defendant
Maeda Pacific Corporation

MEMORANDUM OF POINTS AND AUTHORITIES

I. Background:

1. On August 9, 2005, this action was removed from Superior Court to this Court. The Complaint alleges that the Plaintiff suffered personal injury, including financial loss, due to the alleged negligence of the Defendant.

2. Pursuant to the Court's Case Management Order of September 2, 2005, the Court Ordered that all Discovery shall be served by December 31, 2005, and that all discovery motions shall be filed on or before March 2, 2006. The Court further Ordered that Plaintiff provide its expert disclosure and report by March 1, 2006, and that all expert discovery shall be completed by April 12, 2006. The parties informally agreed to the extension of the discovery cut off date.

3. On April 4, 2006, Plaintiff disclosed the identify of his designated expert witness but the required report pursuant to F.R.C.P. 26(a)(2) was not provided as the expert had not yet examined the Plaintiff. A copy of the disclosure letter is provided as Exhibit A.

4. On May 2, 2006, Plaintiff's counsel provided a report and Curriculum Vitae for his designated expert witness, Dr. H. Christine Brown of Island Medical Center. Dr. Brown was not identified in any response to Interrogatories and Request for Production of Documents as a treating physician or expert witness. A copy of Dr. Brown's report and Curriculum Vitae are attached Exhibit B.

II. Federal Rules of Procedure Require The Exclusion of Testimony and Evidence as Plaintiff Failed to Produce Discovery

The Federal Rules of Civil Procedure are intended "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1 (1993). A party to a civil proceeding in federal district court is under a duty to timely correct and/or supplement his initial and pretrial disclosures. Fed. R. Civ. P. 26(e)(1) (2000). "[T]he litigants should not indulge in

1 gamesmanship with respect to the disclosure obligations.” *Marchand v. Mercy Med. Ctr.*, 22
2 F.3d 933, 936 n. 3 (9th Cir. 1994) (*citing* Fed. R. Civ. P. 25 advisory committee’s note). The
3 failure to comply with disclosure requirements triggers automatic sanctions under Rule 37(c)(1):
4 A party that without substantial justification fails to disclose information required by Rule 26(a)
5 or 26(e)(1) or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless
6 such failure is harmless, be permitted to use as evidence at a trial, at a hearing or on a motion any
7 witness or information not so disclosed. Fed. R. Civ. P. 37(c)(1) (2000).

9 The penalty for failing to comply with disclosure requirements is “self-executing” and
10 “automatic”. Fed. R. Civ. P. 37(a) advisory committee’s note. FRCP Rule 26(e) does not require
11 that a discovery order be violated before sanctions can be imposed. This Court has “inherent
12 power to discipline breaches of Fed. R. Civ. P., Rule 26(e), even in the absence of a court order”,
13 including the sanction of excluding the evidence. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24,
14 27 (9th Cir. 1980); 6 MOORE’S FEDERAL PRACTICE, § 26.132[6] (footnotes omitted). Thus,
15 a motion to compel compliance with the discovery rules does not need to be filed before the
16 exclusion sanction can be imposed. A party may secure exclusion of evidence produced in
17 violation of FRCP Rule 37(c)(1) through a motion in limine. *Paradigm Sales, Inc. v. Weber*
18 *Mktg. Systems, Inc.*, 880 F. Supp. 1247, 1255-56 (N.D.Ind. 1995).

21 In determining whether the court should properly exclude undisclosed evidence,
22 including both testimonial and documentary evidence, the following five factors should be
23 considered: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to
24 manage its docket; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy
25 favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.
26 *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997) (*citing* *Wanderer v. Johnston*, 910
27 F.2d 652, 656 (9th Cir. 1990)); *see also* *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997).

1 The first two of these factors favor the imposition of sanctions in most cases, while the
2 fourth cuts against a default or dismissal sanction. *Wanderer* , 910 F.2d at 656. Thus, the key
3 factors are the risk of prejudice and the availability of lesser sanctions. *Id* . A defendant suffers
4 prejudice if the plaintiff's actions impair the defendant's ability to go to trial or threaten to
5 interfere with the rightful decision of the case. *Adriana Int'l Corp. v. Thoeren* , 913 F.2d at 1406,
6 1412 (9th Cir. 1990); *see also Payne*, 121 F.3d at 508 (holding that the "last-minute tender of
7 documents does not cure the prejudice to opponents nor does it restore to other litigants on a
8 crowded docket the opportunity to use the courts").

10
11 A. Plaintiff's Designated Expert Testimony and Report Should Be Excluded For Failure
12 to Timely Disclose and Failure to Establish Qualifications As An Expert.

13 1. The Expert and Report Should be Excluded For Failure to Produce As
14 Directed by the Court.

15 Plaintiff's eve of trial disclosure and incomplete production of his expert witness
16 testimony demands the exclusion of such testimony. Notwithstanding the Court's Order that
17 experts be designated and reports provided by March 1, 2006, and that all expert discovery by
18 April 12, 2006, Plaintiff delayed disclosure of his expert's identity until April 4, 2006.
19 Moreover, even at that late date, Plaintiff failed to provide the required expert report and further
20 disclosed that his designated expert had not even examined the Plaintiff. Counsel's letter further
21 noted that Plaintiff would not be examined until some time after April 10, 2006, two days prior
22 to the completion of expert discovery.

23 It was not until May 2, 2005, that the report and Curriculum Vitae of Dr. Brown were
24 finally provided. Plaintiff's eve of trial disclosure has prejudiced Defendant because not only
25 was the information provided too close to the trial date to provide for effective discovery, the
26 report itself appears to be based on unknown information.
27
28

1 The expert report suggests that other medical information exists which has not been
2 provided to the defense. On the first page of her report, Dr. Brown notes that she reviewed
3 records of treatments provided by the "Murao Clinic." The "records of treatment" are not
4 identified.

5
6 Plaintiff having failed to produce Court ordered medical records; the defense is left to
7 guess as to what "records of treatment" Dr. Brown used to reach her opinion. Additionally, Dr.
8 Brown makes reference to "interview and examination" of Plaintiff on April 19, 2006, but no
9 office notes of the interview or exam are provided. Thus, even if time had permitted to depose
10 Dr. Brown, it would have been impossible to effectively do so due to Plaintiff's failure to
11 produce the records ordered by the Court. As the production of this information was entirely
12 within Plaintiff's control, he should not now benefit by allowing his witness to provide expert
13 testimony without timely disclosing the report or the information utilized in the preparation of
14 the report. Dr. Brown also opines that a referral to a neurologist is appropriate and that would
15 involve additional expense to the Plaintiff, but provides no opinion as to what that additional
16 expense would be.

17
18 Where a party has failed to provide expert witness discovery, exclusion is the only
19 applicable remedy. *See, Miksis v. Howard*, 106 F.3d 754, 760 (7th Cir. 1997) (The court did not
20 abuse its discretion in striking defendant's experts for failure to make timely disclosures.);
21 *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380-381 (5th Cir. 1996) (The court did not abuse
22 its discretion in striking the testimony of plaintiff's expert witnesses for failure to comply with
23 discovery order requiring that witnesses be identified and submit to depositions by a certain
24 date.); *Hull v. Eaton Corp.*, 825 F.2d 448, 452, 263 U.S.App. D.C.311, 315 (D.C. Cir. 1987) (A
25 court may sanction a party's continued and unexcused refusal to name an expert witness by
26 precluding testimony from such witness without first determining how badly the party needs the
27
28

1 witness.)

2 2. The Proposed Expert Testimony and Report Should be Excluded as
 3 Inconsistent

4 The introduction of expert testimony is provided for in Federal Rule of Evidence 702.
 5 Generally, for its witness to provide an expert opinion, Plaintiff must lay sufficient foundation
 6 for the trial court to determine that the witness is "qualified as an expert by knowledge, skill,
 7 experience, skill, experience, training or education" before being such opinion testimony is
 8 permitted. Fed.R.Evid. 702. The Court in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S.
 9 579, 113S.Ct. 2786, 2798(1993) requiring an expert to be qualified said:
 10

11 "This gate keeping function requires the trial court to determine,
 12 given the proffered expert's background, whether the scientific,
 13 technical or specialized knowledge he offers will assist the trier
 14 better to understand a fact in issue." *Gaydar v. Sociedad Instituto*
Gineco, 345 F.3d 15, citing *US v. Alzanki*, 54 F.3d 994, 1005 (1st
 Cir. 1993).

15 It appears that Plaintiff will attempt to use the report as expert opinion evidence
 16 concerning the alleged permanent nature of the nerve damage. In this regard, Plaintiff has failed
 17 to establish Dr. Brown as an expert in neurology and the report itself casts serious doubts on its
 18 findings as Dr. Brown defers her opinion to a neurologist to determine the extent of nerve injury
 19 and its permanency.

20
 21 On page 2, section 3 of the proffered report, Dr. Brown discusses the alleged nerve
 22 damage to Plaintiff's index finger states:

23
 24 "...my diagnosis is that this is an injury to the nerve in the client's
 25 finger and its most likely permanent. As a general practitioner, I
 26 would defer this conclusion to a neurologist to determine the extent
 of the nerve injury and would recommend the patient visit a
 neurologist."

27 Given the self doubting nature of the report, with respect to Dr. Brown's recognition of
 28 her own limited ability to diagnosis the injury and need for further opinion, the prejudice of her

1 testimony and report clearly outweighs any probative value.

2 The proffered report and the qualifications of Dr. Brown as a general practitioner offers
3 no such assistance to the trier of fact and is prejudicial to Defendant as it allows an the
4 designated expert to offer an opinion which she herself admits she is not qualified to make.
5


6 To allow Dr. Brown to provide an expert opinion in light of her position that a referral to
7 neurologist is more appropriate is clearly prejudicial to the defense when there was no
8 opportunity to conduct responsive discovery as to what that expert may have opined and whether
9 any permanent damages exists. To paraphrase Dr. Brown, an expert opinion is required and that
10 has not yet been proffered to the Court.
11

12 **CONCLUSION**

13 Because of Plaintiff's failure to comply the Court's Order to produce and complete expert
14 discovery and to provide a foundation for the offering of expert testimony, Defendant
15 respectfully requests the exclusion of any introduction of expert testimony by Plaintiff.
16

17 CARLSMITH BALL LLP

18
19 DATED: Saipan, MP, May 16, 2006.

20 
21 JOHN D. OSBORN
22 Attorneys for Defendant
23 Maeda Pacific Corporation
24
25
26
27
28

TORRES BROTHERS, LLC.

ATTORNEYS AT LAW

BANK OF GUAM BUILDING, THIRD FLOOR
P.O. Box 501856
SAIPAN, MP 96950
TEL.: (670) 233-5504/6 FAX: (670) 233-5510

Victorino DLG. Torres, Esq.
Joaquin DLG. Torres, Esq.
Vincent DLG. Torres, Esq.

April 4, 2006

John D. Osborne
CarlSmith Ball LLP
P. O. Box 5241
Saipan, MP 96590
Tel: (67) 322-3455

Re: *Takahashi v. Maeda: Civil Action No. CV 05-0026*

Dear John:

The name of the Doctor that will be testifying at our expert witness is:

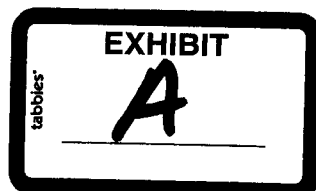
H. Christine Brown, MD
P. O. Box 504669
Saipan, MP 96950

Dr. Brown works at Island Medical Center. As I informed you over the phone, I cannot comply with Rule 26 (b) (4) (A) (i) at this point because Dr. Brown has not been able to meet with the plaintiff. The plaintiff is expected on the 10th of April, 2006 and Dr. Brown will meet with him immediately thereafter. My office will provide you a copy of her report as soon as we get it from Dr. Brown.

Thank you for your time and cooperation in this matter. Please advise if there is anything else that you want or need.

Si Yu'us Ma'ase,

Joaquin DLG. Torres
Attorney for T. Takahashi



RECEIVED
CARLSMITH BALL LLP
ATTORNEYS AT LAW
DATE: 4-04-06 TIME: 3:46 pm
BY: _____



MICRONESIAN HEALTH CORPORATION

Island Medical Center*Your NEW Family Care Center*

PO Box 504669 CK, Saipan, MP, 96950 * Phone: 670-235-8880 * Fax: 670-235-8370 * email: imc@opticom.com

April 21, 2006

Re: **Toshihiro Takahashi**DOB: **July 8, 1946****1. Name and Qualifications of Expert Witness**

H. Christine Brown, M.D.

Medical Training:

Residency: University of Cincinnati Family Practice Residency Training Program, 1992-1995.

Medical School: University of South Florida, College of Medicine, 1992.

Medical Experience

Medical Director Island Medical Center, Saipan, MP, 2002 to present.

Physician, Elder Health of Volusia, 2001.

Locum Tenens Physician, Queensland, Australia, 2000.

Physician, Hendry Regional Medical Center, Clewiston, Florida 1995-1999.

2. Data or other Information Considered by Expert in Forming Opinion.

A. Interview and examination of Mr. Toshihiro Takahashi on April 19, 2006.

B. Medical records from Pacific Medical Center from March 18, 2005.

C. Records of treatment at Murao Clinic March 22, 2005 to April 1, 2006.

D. Medical records from Saipan Health Center, Mr. John Pangelinan from March 18, 2005.

E. Evaluation of right hand X-ray from Saipan Health Center from May 27, 2005.

F. Medical records from Medical Associates of the Pacific, Dr. Norma Ada, from September 12, 2005.



G. Receipts and Medical Certification, Dr Sakaru Suzu Osteopath Clinic, April 5 through March 2006.

H. Deposition of Toshihiro Takahashi Taken on April 12, 2006.

I. Pictures of Injury and location.

3. Complete statement of all opinions to be expressed:

- A. Injury to right shin, right shoulder, and right second finger were caused by the fall which occurred on or about March 17, 2005.
- B. Injury to the right shin is healed, with a permanent scar remaining.
- C. Injury to the right shoulder is healed, with no scar.
- D. Injury to the right second finger has persisted for over one year. It has remained swollen and the client continues to have pain and a shock sensation through the finger. He also has pain when flexing the finger at the MCP joint and is unable to fully flex the finger. The client has been receiving treatment from Japan but this has not cured the injury. This treatment from the client's description is an "electromagnetic" treatment. There is a Certification from Dr. Suzu Taketoshi which recommends continued treatment.

I have seen the X-ray of the right second finger from May 27, 2005 which is negative for fractured bones.

On examining the patient and taking his history, my diagnosis is that this is an injury to the nerve in the client's finger and it is most likely permanent. As a general practitioner, I would defer this conclusion to a neurologist to determine the extent of the nerve injury and would recommend the patient visit a neurologist.

I am not aware of any neurologist here in the Commonwealth. The closest one is in Guam. Treatment on Guam would require more financial recourses and expenses than if the treatment were here in the Commonwealth.

4. The basis and reasons for the Opinions.

- A. Injury to the right shin: Interview of the witness, visible inspection of the scar, and pictures taken shortly after the injury.

- B. Injury to the right shoulder: Interview and examination of the witness, examination of the shoulder which shows no residual injury, and pictures taken shortly after the injury.
- C. Injury to the right second finger: Interview and examination of the witness. The client continues to complain of nerve shock in the finger and tenderness and swelling at the base of the finger. Although the client has received treatment in Japan, it has not been cured. Records from Japan indicate that the patient needs continued treatment. My evaluation is that the client has a nerve injury to the right second finger which is most likely permanent.

Sincerely,



H. Christine Brown, MD
Medical Director
Island Medical Center

Curriculum Vitae
H. Christine Brown

Current Address

PO Box 504669 CK
Saipan, MP 96950
Phone: (670) 235-8880
e-mail: hcbrown@yahoo.com

Personal

Birth Date: August 29, 1959
Birth Place: Saiki, Japan
Marital Status: Single

Residency

University of Cincinnati Family Medicine Residency Training Program International Health Track Cincinnati, Ohio	1992 - 1995
--	-------------

Medical Education

University of South Florida College of Medicine Tampa, Florida M.D., May 1992	1988 - 1992
--	-------------

Undergraduate Education

University of Central Florida Orlando, Florida B.S. in Biology, May 1998	1986 - 1988
--	-------------

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--	-------------

Stetson University DeLand, Florida	1978 - 1979
---------------------------------------	-------------

Oral Roberts University Tulsa, Oklahoma	1977 - 1978
--	-------------

Professional Experience

Hendry Family Care Center
500 West Sagamore Avenue
Clewiston, Florida 33440

August 1995
to December 1999

Locum Tenens in Queensland, Australia
Global Medical Staffing
Salt Lake City, Utah

January 2000
to September 2000

Elder Health of Volusia
1555 Saxon Blvd., Suite 501
Deltona, Florida

November 2000
to July 2001

Island Medical Center
PO Box 504669 CK
Saipan, MP 96950

April 2002
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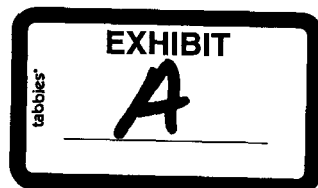
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Attorney for T. Takahashi



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Medical Director
Island Medical Center

Curriculum Vitae
H. Christine Brown

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Phone: (670) 235-8880
e-mail: hcbrown@yahoo.com

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Tel No. 670.322.3455

Attorneys for Defendant
Maeda Pacific Corporation

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

TOSHIHIRO TAKAHASHI,
Plaintiff,

vs.

MAEDA PACIFIC CORPORATION,
Defendant.

CIVIL ACTION NO. CV 05-0026

DECLARATION OF JOHN D. OSBORN

I, John D. Osborn, declare:

1. I am a partner in the Saipan office of Carlsmith Ball LLP, attorneys for Defendant Maeda Pacific Corporation. I have personal knowledge of the matters stated herein and would be competent to testify to same if called upon to do so.

2. Attached hereto marked as Exhibits A-B respectively are true and correct copies of the following documents:

Exhibit A: Letter dated April 4, 2006 from counsel for Plaintiff

Exhibit B: Report and Curriculum Vitae of Dr. H. Christine Brown

1 This declaration is made under penalty of perjury of the laws of the United States on
2 Saipan, Commonwealth of the Northern Mariana Islands this 16th day of May, 2006.

3
4 DATED: Saipan, MP, May 16, 2006.



JOHN D. OSBORN